No. 14,517

IN THE

United States Court of Appeals

For the Ninth Circuit

LIEUTENANT GENERAL W. G. WYMAN, or any other Commanding Officer of the Sixth Army, Presidio, San Francisco, California,

Appellant,

vs.

RUSSELL LOUIS LAROSE,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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APPELLEE'S PETITION FOR A REHEARING.

To the Honorable Judges Mathews and Chambers of the United States Court of Appeals for the Ninth Circuit and District Judge Byrne.

PRELIMINARY STATEMENT.

With all respect to this Court, it is submitted that the jurisdiction of this Court was never properly invoked in this case; that no appeal was ever validly before this Court; and that, even if this Court's appellate jurisdiction had properly been invoked, the appellee's position should have been sustained for the

reasons indicated in Points II and III below, which are not considered by this Court in its present opinion.

THE ARGUMENT.

I. THIS COURT SHOULD GRANT A REHEARING IN THIS CASE FOR THE REASON THAT THIS COURT IN THE PRESENT OPINION HAS FAILED TO PASS ON OR MENTION THE QUESTION OF WHETHER OR NOT THE JURISDICTION OF THIS COURT HAS BEEN PROPERLY INVOKED TO HEAR THE PURPORTED APPEAL IN THIS CASE.

The transcript of the record in this case reveals (p. 12) that, by notice of appeal, dated August 11, 1954, the respondent Lieutenant General W. G. Wyman appealed

> ". . . to the United States Court of Appeals for the Ninth Circuit *from the order, judgment and decree* of the United States District Court for the Northern District of California issuing a writ of habeas corpus discharging Russell Louis LaRose from the custody of respondent Lieutenant General W. G. Wyman, *made and entered on the 18th day of June, 1954.*" (Emphasis added.)

No judgment or decree was made by the United States District Court for the Northern District of California on the 18th day of June, 1954. The order referred to (Tr. pp. 9-10; Opinion of this Court, pp. 4-5), after setting forth two findings, goes on:

> "the petitioner may have his relief as prayed, upon preparation of findings of fact and conclusions of law.

"It is Ordered that the petition for writ of habeas corpus be, and the same hereby is, Granted.

"Dated: June 18, 1954.

/s/ George B. Harris
United States District Judge"

This then is the order appealed from by respondent in this case.

Section 2253 of Title 28 of the United States Code provides:

"Appeal

In a habeas corpus proceeding before a circuit or district judge, the *final order* shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had." (Emphasis added.)

This section specifically makes applicable to habeas corpus proceedings the well settled rule of law that only final orders are appealable. *Collins v. Miller,* 252 U.S. 364; *U. S. ex rel. Bauer v. Shaughnessy,* 178 Fed. 2d 756. Where an order is not a final disposition of a habeas corpus proceeding, no appeal is possible. *O'Leary et al. v. United States,* 53 Fed. 2d 956.

The order appealed from in this case was clearly and on its face not a final order or a final disposition of this matter. First of all, *that* order, the one of June 18, 1954, gave petitioner the relief prayed for, namely the issuance of a writ of habeas corpus, bringing the petitioner merely into Court.

Subsequent to that order, there were two additional orders, on June 23 and June 24, 1955, which

ordered the petitioner discharged and released from the custody and control of the United States Army (Tr. pp. 10 and 11). As a matter of fact, even the June 18th order was to be effective "upon preparation of findings of fact and conclusions of law", which, as this Court has noted (Opinion of this Court, note 12. *Cf. Holiday v. Johnson, Warden,* 313 U.S. 342 at pp. 353-354) were never prepared. The status of petitioner was not changed in any way by the order of June 18th and he remained subjected to the custody of respondent. See *Harkrader v. Wadley,* 172 U.S. 148.

As this Court itself has made clear in *Kellner v. Metcalf,* No. 13309 (201 Fed. 2d 838) where a petitioner presented what purported to be an appeal from an alleged judgment denying a petition for a writ of habeas corpus:

> "Actually, there was no such judgment. Appellant, a prisoner in custody of appellee, a deputy United States marshal, petitioned the District Court for a writ of habeas corpus on December 26, 1951. The writ was issued on December 26, 1951, and was served on appellee on December 27, 1951. Appellee filed a return and produced the body of appellant before the District Court on December 28, 1951. Hearings were had on December 28, 1951, January 4, 1952, and January 11, 1952, but no judgment was ever signed, filed or entered. Therefore the appeal is dismissed."

Since the purported appeal in this case was taken from an order which was not by its very nature final

nor dispositive of the custody of petitioner, this Court lacked jurisdiction to proceed to hear and determine the purported appeal, whatever the action of the parties.

II. THIS COURT SHOULD GRANT A REHEARING IN THIS CASE FOR THE REASON THAT THIS COURT IN THE PRESENT OPINION HAS FAILED TO CONSIDER THE PREJUDICE RESULTING TO APPELLEE FROM THE LOCAL BOARD'S ACTION IN GIVING HIM A CLASSIFICATION OF II-S ON JULY 23, 1952, WITHOUT A HEARING WHEN SUCH CLASSIFICATION, THOUGH NUMERICALLY LOWER THAN I-A-O, WAS NOT NECESSARILY THE APPROPRIATE, CORRECT, NOR LEAST PREJUDICIAL CLASSIFICATION AVAILABLE.

The opinion of this Court sets forth (p. 7) that the letter of appellee dated February 1, 1952, was clearly not an appeal but rather a request that the local board reopen his classification and consider it anew; that no hearing attended by appellee was requested by appellee; and that he was not ". . . in any way prejudiced by the failure to accord him such a hearing. The reconsideration requested and obtained by him resulted in his being put in a lower class (II-S instead of I-A-O), thus benefiting instead of prejudicing him."

The failure of a local board to accord a personal hearing, as required by Selective Service Regulation 1624.1, has repeatedly been held to be such a procedural failure as to invalidate the action taken by a board.

Berman v. Craig, 207 Fed. 2d 888;
United States v. Stiles, 169 Fed. 2d 455.

Even unclear and confused requests have been held to constitute sufficient requests to require this personal appearance (see, e.g.: *United States v. Derstine,* 129 Fed. Supp. 117), "for it cannot be supposed that Congress intended to deal with registrants as if they were engaged in formal litigation, assisted by counsel . . ." *Smith v. United States,* 157 Fed. 2d 176, 183.

The failure of the local board to hear appellee in this case was not clearly lacking in prejudice. While it is true that appellee was classified II-S in the Spring of 1952, such classification was, by regulation, temporary only and subject to annual review (see Selective Service Regulation § 1622.21).

Evidence which appellee might have produced at the required hearing might have resulted in his being placed in categories I-O or I-W. Though Class I-O is numerically higher than Class II-S, it is not in keeping with appellee's expressed beliefs, while Class I-W is, of course, lower. Both, however, are of a more permanent nature and consequently less prejudicial to him than the board's action.

The board's failure to accord this procedural right then was not saved by a demonstrated lack of prejudice, even if such were possible.

III. THIS COURT SHOULD GRANT A REHEARING IN THIS CASE FOR THE REASON THAT THIS COURT IN THE PRESENT OPINION HAS STATED (AT PAGE 7) THAT APPELLEE FAILED TO APPEAL THE I-A-O CLASSIFICATION GIVEN HIM BY THE LOCAL BOARD ON SEPTEMBER 23, 1952, WHEN IN FACT THE RECORD BELOW INDICATES THAT APPELLEE DID ATTEMPT TO APPEAL SUCH CLASSIFICATION.

The opinion of this Court states (p. 7) that:

> "Appellee did not appeal from his I-A-O classification of September 23, 1952, nor did he, on September 23, 1952, or at any time thereafter, request the local board to reopen his classification or to consider it anew. In short, he failed to exhaust his administrative remedies and hence was not entitled to seek relief in the District Court."

In fact, the transcript of record shows clearly, at pages 60 through 63, that appellee, within ten days from the receipt of his I-A-O classification of September 23, 1952, made repeated requests for action at the local board and, upon being told that an appeal would do no good, went directly to the Deputy State Selective Service Director, as advised by the local board, and was again told that an appeal would be useless and he acted, or failed to act, for this reason (Tr. pp. 62-63).

While it is true then that appellee failed to follow the technical requirements for the filing of an appeal, he did do everything which appeared to him to be possible, on the advice of his local board and of the Deputy State Selective Service Director. He thus attempted to comply with the requirements to the

extent of his knowledge thereof and such failure as did occur appears to have been caused by those in authority to whom he looked for guidance. Again, it must be noted that the Courts have repeatedly held that:

> "Registrants are not thus to be treated as though they were engaged in formal litigation assisted by counsel."
>
> *Craig v. United States,* 207 Fed. 2d 888;
> *Smith v. United States,* 157 Fed. 2d 176.

It cannot be said then, in the light of the record, that appellee did not do all that was possible to protest and appeal that I-A-O classification of September 23, 1952.

We respectfully submit that a rehearing should be granted for the reasons and for each of the reasons stated in this petition.

Dated, San Francisco, California,
July 15, 1955.

Respectfully submitted,

LAWRENCE SPEISER,
Staff Counsel, American Civil Liberties Union of Northern California,

J. H. BRILL,
Attorneys for Appellee and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
July 15, 1955.

LAWRENCE SPEISER,
Of Counsel for Appellee and Petitioner.